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No. 93-1471

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANCIS SOMENSKI and JOHN WALSH,
Petitioners,

v.

COMPANHIA DE NAVEGACIO LLOYD BRASILEIRO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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COUNTERSTATEMENT OF THE CASE

The Petition correctly states that petitioners Francis Somenski and John Walsh are longshoremen who were injured while assisting with the discharge of steel pipes from the No. 5 lower hold of the M/V LLOYD TUPIARA. The Petition also correctly indicates that the manner of discharge utilized by the discharging stevedore, petitioners' employer, caused a bundle of pipes to become "caught" on other cargo and, as a result, the bundle swung around and struck petitioner John Walsh who, in turn, struck petitioner Francis Somenski, causing him to fall off the pipes to the bottom of the hold. *See* Petition at pp. 4-5. The Petition, however, also contains numerous mischaracterizations regarding the testimony at the trial of this case.

First and foremost, the Petition is misleading to the extent it implies that the stowage plan prepared by the ship's officers determined the *manner* in which cargo was stowed aboard the vessel. This is not true. The stowage plan was simply a schematic which indicated the quantity and type of cargo to be placed in each hold. (4a). The Captain of a vessel is required to review the stowage plan for every voyage, no matter who prepares it, so he knows the location and weight of the cargo and can ensure the stability of the vessel. (4a). The stowage plan in this case said "nothing about the stacking, locating, or securing of the cargo." (4a). These matters were "left to the expertise of the [loading] stevedore." (4a). Therefore, the trial judge, acting as judge and factfinder, correctly determined that the preparation and/or review of a stowage plan was "not sufficient to impose liability on the shipowner . . . because to do so would negate the shipowner's ability to rely upon the expertise of the stevedore . . . during cargo loading and unloading." (4-5a).

In addition, the Petition is misleading to the extent it alleges that the Master of the M/V LLOYD TUPIARA, Captain Wilton DeJesus Santos, had actual knowledge of the alleged hazard. During the trial of this case, petitioners alleged that the cargo presented a hazard because: (1) the pipes were "stowed to too great a height" within the hold; (2) "the two piles of pipe overlapped;" and (3) there was "insufficient chocking between the bundles of pipe." *See* Petition at p. 4. It is true, as petitioners point out, that Captain Santos observed the height to which the pipes were stowed in the hold. However, the trial judge determined that this was not a viable theory of liability in this case, since the height of the pipes did not cause the accident. Rather, the cargo defect that caused the accident, if any, was the lack of a separation between the two piles of pipe. Petitioners' own expert, Captain Kenneth Mistry, admitted that if the piles of pipe had been separated " 'of course,' they could have been discharged safely." (5a).

Thus, based upon this testimony, the trial judge, acting as factfinder, determined that the height of the cargo was not a factor in causing the accident.

As for the overlapping condition of the pipes and the alleged lack of sufficient chocking, there was no evidence presented to support a finding that Captain Santos was aware of these conditions. In fact, Captain Santos testified that, as far as he knew, there was a "separation" between the two columns of pipe. (1b). In addition, there was no evidence presented to support a finding that Captain Santos knew how much chocking the loading stevedore used in stowing the cargo. Furthermore, there was no evidence presented to support a finding that Captain Santos was aware of any hazard involving the stowage of the pipes. Captain Santos testified that, as far as he was aware, the pipes were stowed in the customary manner (1b) and there were no prior problems when pipes were stowed in this manner. (1b). More importantly, as the district judge pointed out, the condition of the cargo was inspected by a "senior representative" of the discharging stevedore who would not allow work to begin if the cargo presented " 'a problem' or a safety hazard." (5a n.5).

Finally, the Petition is misleading to the extent it alleges that the choice of the No. 5 hold for stowing this cargo was somehow improper. As noted, during the trial of this case, petitioners' expert, Captain Mistry, acknowledged that there was sufficient room in the No. 5 hold to stow two totally separate stacks of pipe and, if the stacks had been separated, " 'of course' they could have been discharged safely." (5a). Therefore, according to petitioners' own expert, the selection of the No. 5 hold for stowing steel pipes was not a cause of the hazard. The hazard, if any, was created by the manner in which the cargo was stowed by the independent loading stevedore and/or the manner in which it was discharged by the independent discharging stevedore. In fact, as factfinder, the trial court specifically found that even if

preparation of the stowage plan constituted active involvement in the loading operation by the shipowner, there was no evidence that the vessel "failed to exercise reasonable care." (6a).

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition accurately states that this Court granted a Writ of Certiorari in the case of *Howlett v. Birkdale Shipping Co., S.A.,* No. 93-670, ___ U.S. ___, 114 S.Ct. 681 (1994), to resolve a conflict among several Circuit Courts of Appeals as to whether a shipowner has a duty to supervise the loading operation of an independent stevedore. Oral argument regarding the *Howlett* case was held on April 20, 1994. Petitioners assert that the holding in *Howlett* would effect the rulings of the district court and the Third Circuit Court of Appeals in this case. This is not true. The "duty" at issue in *Howlett* was not raised during the trial or the appeal of this case. It cannot, therefore, be raised for the first time in a Petition for Writ of Certiorari.

In *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981), this Court defined the duties owed by a vessel owner to a longshoreman. Those duties have been categorized as: (1) the "turnover duty" (which includes the corollary "duty to warn"); (2) the "duty to intervene"; and (3) the "active operations duty." In *Howlett,* the petitioner has sought to impose a duty upon shipowners to supervise the work of loading stevedores through an overly broad and unwarranted interpretation of the "turnover duty." In this case, however, petitioners never raised a theory of liability premised upon the "turnover duty." Instead, the case proceeded to trial, and an appeal was prosecuted, based solely upon an alleged breach of the "active operations" duty due to the vessel's preparation of the stowage plan. As the lower court pointed out in its Opinion, petitioners did not "contend that the ship's equipment was maintained in a negligent

condition, nor [did] they claim that CNLB [the shipowner] knew (or should have known) of any hidden danger." (4a). The duty at issue in *Howlett,* therefore, was never raised before the district court or the court of appeals.

This Court has repeatedly stated that an issue which was not raised or pressed before the district court or the court of appeals cannot be raised for the first time in a Petition for Writ of Certiorari. *See e.g., Delta Air Lines v. August,* 450 U.S. 346, 362 (1981); *Hoover v. Ronwin,* 466 U.S. 558, 574 n. 25 (1984); *Illinois v. Gates,* 462 U.S. 213, 222-23 (1983) (the fact that the trial court relied upon established precedent is irrelevant; petitioner must raise issue at trial and/or Court of Appeals level). In this case, Petitioners readily admit that they did not pursue a claim based upon a breach of the "turnover duty." *See* Petition at p. 5. Accordingly, the issue in *Howlett* is *not* an issue in this case; a theory of liability premised upon the "turnover duty" has been waived.

Furthermore, the *Howlett* case is distinguishable in another important respect. The petitioner in *Howlett* alleged that the dangerous condition in the stow (i.e. plastic on the deck) was hidden from view at the start of the discharge operation and was "unknown to the [petitioner] longshoreman and his stevedore employer." *See* Brief for Petitioner in *Howlett v. Birkdale Shipping Co., S.A.,* No. 93-670, at p. i ("Question Presented"). Therefore, using the alleged "hidden" nature of the hazard as support for his argument, the *Howlett* petitioner sought to impose liability upon the shipowner under the "turnover duty."[1] Thus, the duty proposed by the *Howlett* petitioner would be limited to hidden conditions

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1. As the respondent-shipowner in *Howlett* pointed out to this Court, the district judge in that case determined that the condition was "open and obvious," i.e. if the stevedore and its employees used reasonable care to identify potential hazards before and during the discharge operation as required by law, the plastic on the deck would have been readily discoverable.

in the cargo stow. In this case, there is no dispute that the plaintiff-longshoremen and the stevedore-employer had actual knowledge of the overlapping condition of the pipes.[2] Therefore, the theory of liability proposed in *Howlett,* even if adopted, would not support a finding of shipowner liability in this case.

Finally, the issue in *Howlett* is whether a vessel owner has a duty to conduct inspections during the course of cargo operations to prevent the creation of hidden cargo defects for the safety of the longshoremen who will board the vessel in subsequent ports. As discussed, even if this duty were imposed, it would not support a finding of shipowner liability in this case. Furthermore, to impose liability upon vessel owners for such alleged cargo hazards would be contrary to the congressional intent underlying the 1972 Amendments to the Longshore & Harbor Worker's Compensation Act and the elimination of the doctrine of seaworthiness. *See* Brief of Respondent in *Howlett.* Under any theory, shipowner liability for cargo conditions, if any, should be limited to situations where the vessel has actual knowledge of a hazard and the condition would not be obvious to or anticipated by a reasonably competent stevedore. In this case, the condition at issue was open and obvious and was known to the stevedore-employer. Furthermore, there was no evidence presented to establish that the vessel had actual knowledge of any hazard.

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2. As noted, according to the testimony of petitioner's expert, Captain Mistry, the overlapping condition of the pipes was the cause of the accident.

CONCLUSION

The conflict at issue in *Howlett v. Birkdale Shipping Co., S.A.*, No. 93-670, ____ U.S. ____, 114 S.Ct. 681 (1994) is not an issue in this case. Even if it were an issue, the issue was waived. More importantly, the decision of the lower court in this case was based upon the lower court's conclusion, as factfinder, that there was no evidence that the vessel was negligent. (6a). Since there are no other issues presented which are ripe for review, respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Excerpt from Testimony of
Captain Wilton De Jesus Santos

Q. Captain, do the ship's officers or crews supervise the loading operations by the stevdore?

A. No.

Q. Captain, do you believe it is dangerous to stow pipe under the 'tween deck in the manner depicted in Photograph Defense Exhibit 4?

* * *

A. No.

Q. Why is that, Captain?

A. Because I have done this for 14 years.

* * *

Q. In those 14 years, Captain, did the loading stevedore ever have an accident or problem while loading pipe and stowing the pipe under the 'tween deck?

* * *

A. No.

Q. In those 14 years, Captain, did the discharging stevedore ever have a problem or accident while discharging pipe from under the 'tween deck?

* * *

A. No.

* * *

Q. So that if you made two columns of pipe in the No. 5 hold, some of the pipe had to overlap the pipe at the other end, didn't it?

A. No, no. They were left with the most minimum separation so they would facilitate the unloading, the discharging.